Supreme Court, U.S.
FILED
JUN 1 2000
OFFICE OF THE CLERK

No. 99-804

IN THE
**Supreme Court of the United States**

CARL W. CLEVELAND
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

# BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LISA KEMLER
Of Counsel
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
108 North Alfred Street
Alexandria, VA. 22314
(703) 684-8000

ELLEN S. PODGOR*
Georgia State University
College of Law
140 Decatur Street
Atlanta, Georgia 30303
(404) 651-2087

*Counsel of Record

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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and to ensure that criminal statutes are construed and applied in accordance with the United States Constitution. One of its particular concerns is ensuring that all individuals, including the criminal accused, not be subjected to prosecutorial overreaching. Thus, members of the NACDL have an interest in assuring that 18 U.S.C. § 1341, the mail fraud statute, is construed, in accordance with a majority of the courts, to curb prosecutors from bringing charges under this statute when the element of "money or property" is not premised upon an actual property interest.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The mail fraud statute, 18 U.S.C. § 1341 requires either a scheme to deprive of "money or property" or a deprivation of the "right to honest services." There is no allegation of a deprivation of the "right to honest services" in this case, and the alleged deprivation of "money or property" is premised upon an alleged false statement or omission in an application for a state video poker license. *See United States v. Cleveland,* 951 F.Supp. 1249, 1259n.6 (E.D. La. 1997)

The majority of circuit courts have held that an unissued state license is not "property" for the purposes of the mail fraud statute. This position should be accepted by this Court in that a state license, such as a video poker license, is merely a state acting in a regulatory manner. Further, an unissued state license does not create a property interest in the licensor, the State of Louisiana. Thus, there can be no scheme to defraud the State or its citizenry of "money or property."

To permit an unissued state license to be "property" for purposes of the mail fraud statute enlarges an already generic statute far beyond its original intent. There is no indication in the legislative history that Congress intended to monitor state activity in adopting the mail fraud statute. Further, the ramifications of allowing mail fraud to be used when there is an allegation of a misstatement in an application for a state license would permit federal prosecutors to use their prosecutorial discretion to make state licenses and permits subject to federal scrutiny. Permitting federal prosecutors to act as legislators when alleged state criminality is at issue will alter the appropriate balance between the state and federal government.

## ARGUMENT

### A. UNISSUED STATE LICENSES ARE NOT "PROPERTY" FOR PURPOSES OF 18 U.S.C. § 1341, THE MAIL FRAUD STATUTE

Absent an allegation that the prosecution is premised upon an "intangible right of honest services," a "scheme to defraud" of "money or property," is an essential element of 18 U.S.C. § 1341, the mail fraud statute. The mail fraud statute, enacted in 1872, was one section in a recodification of the Postal Act. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283 (codified at 18 U.S.C. § 1341). The term "money or property" was specifically affixed within the statute as a result of a 1909 amendment that added the language, "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130. "[T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property." *McNally v. United States*, 483 U.S. 350, 356 (1987).

This Court, in *McNally v. United States,* 483 U.S. 350 (1987) confirmed the necessity for a mail fraud charge to be premised upon a deprivation of "money or property." *Id.* at 356. Although this Court has accepted intangible property as satisfying the "money or property" element of the mail fraud statute,[2] it has never included state government regulatory

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[2] *See Carpenter v. United States*, 484 U.S. 19 (1987). In *Carpenter* this Court found that "[c]onfidential business information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit, and which a court of equity will protect

actions as property for the purposes of mail fraud.

Not surprisingly, the majority of circuit courts considering the question of whether a license constitutes property have found that a license is not property for purposes of the mail fraud statute. For example, the Second Circuit in *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991), held that export licenses were not property for purposes of a federal fraud statute. The Sixth Circuit in *United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988) found that bingo licenses were not property for purposes of the mail fraud statute. The Seventh Circuit in *Toubali v. United States*, 875 F.2d 122 (7th Cir. 1989), refused to find a taxi license to be property under the mail fraud statute. The Eighth Circuit in *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990), found that there was no deprivation of property for purposes of mail fraud when the government alleged a falsification of an application for a school bus operator's license. The Ninth Circuit in *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989), refused to find property for purposes of the mail fraud statute in a case involving pilot licences. The Eleventh Circuit in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) held that a state bail bond license was not property for purposes of the mail fraud statute. Additional cases within these circuits also support the majority position of unissued licenses not being property for purposes of the mail fraud statute. *See, e.g., United States v. Vollmer & Company, Inc.*, 1 F.3d 1511 (7th Cir. 1993).

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through the injunctive process or other appropriate remedy." *Id.* at 26. (*citing* 3 W. Fletcher, Cyclopedia of Law of Private Corporations § 857.1, p. 260 (rev. ed. 1986)). Additionally, a 1988 amendment permits mail fraud to be premised upon "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, P.L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (1994)).

This Court should reject the few decisions opposite the majority[3] in that an unissued state license is merely regulatory in nature and not property. As stated by the court in *United States v. Schwartz*, 924 F.2d 410 (2nd Cir. 1991), "the government's power to regulate does not *a fortiori* endow it with a property interest in the license; that is, the mere issuance of a document designed to formalize the government's regulation does not thereby create a property interest for the government." *Id.* at 417.[4]

Licenses, may in some instances create property interests in the licensee. *See Bell v. Burson*, 402 U.S. 535 (1971) (due process required prior to revocation of a driver's license). The property interest of a licensee, however, is not equivalent to the regulatory interest of the entity issuing the license, the licensor. Thus, even if one were to find that the licensee had a property right in the license, this would be irrelevant since the "scheme or artifice to defraud" is allegedly being perpetrated against the licensor (State of Louisiana). The deprivation, thus, needs to be of "property" of the licensor.[5]

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[3] *See, e.g., United States v. Salvatore,* 110 F.3d 1131 (5th Cir. 1997); *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992); *United States v. Martinez*, 905 F.2d 709 (3rd Cir. 1990).

[4] The *Schwartz* decision references *United States v. Evans*, 844 F.2d 36, 42 (2nd Cir. 1988) which held that, "[b]ecause of the substantial differences between international arms sales and common-law property transactions, we conclude that the United States's interest in regulating foreign resales of arms is not a property right for wire and mail fraud purposes."

[5] Sentencing Guideline 2F1.1 emphasizes a deprivation of "money or property" in providing punishment that is determined in part by the amount of loss suffered by the victim. U.S.S.G. 2F1.1.

When a license has not been issued, it is even more definitive that there is no property for purposes of the mail fraud statute. Any possible property interest that might be alleged to exist would only accrue after the license is issued. An unissued license is nothing more than a possibility. Therefore, it cannot be claimed that one of the parties who might be the recipient of the license has deprived the licensor of property. A mere possibility is not tangible or intangible property.

## B. EXTENDING THE "PROPERTY" ELEMENT OF 18 U.S.C. § 1341 TO INCLUDE STATE UNISSUED LICENSES WOULD PERMIT PROSECUTORIAL DISCRETION TO REPLACE LEGISLATIVE ACTION, AND WOULD DISRUPT THE APPROPRIATE BALANCE BETWEEN STATE AND FEDERAL GOVERNMENT

The mail fraud statute provides no indication that Congress intended to include unissued licenses as "property." Allowing prosecutorial discretion to determine whether a state or local regulatory action should be used as "property" for the purposes of the mail fraud statute, would result in executive branch officials, namely federal prosecutors, acting in a legislative capacity. If federal prosecutors are given the discretion to charge mail fraud whenever there is an allegation of a misstatement in a state or local license application that is incident to a mailing, the appropriate balance between the state and federal government would be seriously altered. As previously stated by this Court, "'[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.'" *Printz v. United States*,

521 U.S. 898, 921 (1997) (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Absent statutory language or legislative history, a broad reading of a federal statute to "transform relatively minor state offenses into federal felonies," is unwarranted. *Rewis v. United States*, 401 U.S. 808, 812 (1971). In *United States v. Bass*, 404 U.S. 336 (1971), this Court stated:

> we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

*Id.* at 349.

Congress can encompass state law within a federal statute when it is explicitly considers the state application. For example, Congress included within the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. § 1961 et.seq.) (RICO) a specific list of state activities that can form predicate acts for purposes of the federal statute.[6] Congress, also

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[6] State acts that can be "racketeering activity" for purposes of RICO are limited to "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; ...". 18 U.S.C. § 1961 (1)(A).

provided in the RICO statute the number of state acts required for a federal prosecution.[7]

One does not find similar language in the mail fraud statute or in the sparse legislative history that was aimed at the protection of the "post-office establishment of the United States."[8] Permitting unissued state licenses to serve as "property" for purposes of mail fraud would expand the statute well beyond its intended purpose.

Congress has expressed concern regarding the expansion of the mail fraud statute.[9] The legislative history of the bank fraud statute (18 U.S.C. § 1344), a statute that also contains the "scheme to defraud" language found in the mail and wire fraud statutes, reflects Congressional concern with judicial interpretation that has exceeded the intent of Congress. As stated in the legislative history:

> The new section [18 U.S.C. § 1344] would prohibit devising a scheme to defraud a

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[7] A "' pattern of racketeering activity' requires at least two acts of racketeering activity....." 18 U.S.C. § 1961 (5).

[8] *See* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1150-52 (1997).

[9] Scholars have also expressed concern with the expansion of the mail fraud statute. *See, e.g.*, John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Peter Henning, *Maybe It Should Just Be called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 26 B.C. L. REV. 435 (1995); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137 (1990).

> financial institution, or to obtain property of such an institution, and engaging in conduct in furtherance of such scheme. The section thus parallels the language of the current mail fraud and wire fraud statute ("scheme to defraud"), and is intended to incorporate case law interpretations of those sections. The Committee, however, is concerned by the history of expansive interpretations of that language by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions. The Committee believes that while the additional activity that could thus be brought within the purview of the language might well be reprehensible, and probably should be criminal, due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage.

98th Cong.2d Sess., H.R. Rep. 98-901, at 4 (1984).[10]

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[10] Congress has on occasion revised the statute. In reacting to the *McNally,* decision, Congress passed 18 U.S.C. § 1346, permitting a 'scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right to honest services." *Id.* Congress also added to the statute the language, "or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier." Violent Crime Control and Enforcement Act of 1994 § 250006. Congress has not, however, added to the statute a statement that unissued licenses can serve as property for purposes of mail fraud.

If federal prosecutors are given the discretion to use the mail fraud statute whenever there is an allegation of a misstatement in a state or local license application that is incident to a mailing, the appropriate balance between the state and federal government would be seriously altered. Allowing video poker machines within a state is a state prerogative. Some states prohibit video gambling, such as South Carolina. *See Joytime Distributors and Amusement Co., Inc. v. State*, 1999 WL 969280, (S.C. 1999) (slip opinion), *cert. denied* 120 S.Ct. 1719 (2000). Other states, such as Louisiana, permit video poker machines subject to state licensing provisions. *La. Rev. Stat. Ann.* § 27:301 et. seq. (West Supp. 2000). The terms and definitions of the licensing procedure may be explicitly set forth in the state statute. For example, in Louisiana the Video Draw Poker Device Act explicitly states that "[a]ny license issued or renewed under the provisions of this Chapter is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." *Id.* at § 27:301(D).

The ramifications of allowing prosecutors the option to charge mail fraud whenever there is an alleged misstatement in an unissued license application would result in prosecutors having federal jurisdiction of what has traditionally been within the state province. The enormous number of license and permit applications that are routinely filed in state and local municipalities would allow prosecutors an unleashed power to monitor all of these state activities. Permitting a license to be property could mean that every application for a state fishing license could be the subject of federal scrutiny. The use of the mail fraud statute as the model for other fraud statutes, such as wire fraud, bank fraud, and health care fraud, could extend such a result even further.

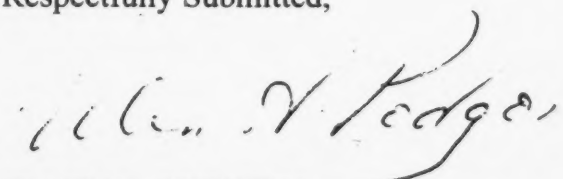
Permitting prosecutors the power to legislate in an area that has traditionally been within the purview of state and local

authority presents grave concerns to our criminal justice system. The American Bar Association, Criminal Justice Section's Task Force on Federalization of Criminal Law, chaired by Edwin Meese III, describes many of the consequences of increased federalization.[11] Providing federal prosecutors with an increased discretion in what can be charged, increases their power to act in a legislative capacity. A shift in power from the legislative branch to the executive branch, and shift in jurisdiction from state to federal, disrupts the ability of the government to run effectively.

## CONCLUSION

For the foregoing reasons, NACDL urges this Court to reverse the judgment of the Court of Appeals.

Respectfully Submitted,



ELLEN S. PODGOR*
Georgia State University
College of Law
140 Decatur Street
Atlanta, Georgia 30303
(404) 651-2087

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[11] *See* ABA Task Force on the Federalization of Criminal Law, The Federalization of Criminal Law 26-43 (1998) (discussing the adverse impact of increased federalization on our criminal justice system).

LISA KEMLER
Of Counsel
National Association of Criminal
Defense Lawyers
108 North Alfred Street
Alexandria, VA. 22314
(703) 684-8000
Counsel for *Amicus Curiae*
National Association of Criminal
Defense Lawyers

*Counsel of Record

May 2000